IN THE SUPREME COURT OF THE STATE OF NEVADA

HERVE GUERRIER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54016

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of burglary and grand larceny. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Prior bad act evidence

Appellant Herve Guerrier contends that the district court erroneously admitted evidence of two prior bad acts of theft. Guerrier asserts that this evidence was highly prejudicial because it demonstrated his propensity to be a thief.

The decision to admit prior bad act evidence is within the sound discretion of the district court and will not be disturbed unless that decision is manifestly wrong. Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), modified on other grounds by Sonner v. State, 114 Nev. 321, 327, 955 P.2d 673, 677 (1998). We conclude that the district court did not commit manifest error in admitting the prior bad act evidence because (1) it was relevant to demonstrate Guerrier's intent, (2) the thefts were proven by clear and convincing evidence, namely the testimony of witnesses to those crimes, and (3) the evidence's probative value was not substantially outweighed by the danger of unfair prejudice. See NRS

48.045(2) (evidence of prior bad acts may be admitted to prove motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident); Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (setting forth three factors for admissibility of prior bad act evidence); Tillema v. State, 112 Nev. 266, 269-70, 914 P.2d 605, 607 (1996) (vehicular and store burglaries would be admissible in vehicular burglary trial to show felonious intent at time of entry).

Guerrier also contends that the district court erred by denying his motion for mistrial based on alleged prosecutorial misconduct during rebuttal closing argument. Guerrier alleged that the prosecutor made improper argument regarding the prior bad act evidence. The "[d]enial of a motion for mistrial is within the trial court's sound discretion. The court's determination will not be disturbed on appeal in the absence of a clear showing of abuse." Owens v. State, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980). We conclude that the district court did not abuse its discretion in denying Guerrier's motion for a mistrial because, even if the prosecutor's argument was inappropriate, the error was harmless because the district court properly admonished the jury that it could only consider the prior bad act evidence for the limited purpose of determining Guerrier's intent. See Hill v. State, 95 Nev. 327, 330, 594 P.2d 699, 701 (1979) (indicating that an admonishment by the district judge can lessen the potential for prejudice when a jury considers prior bad acts).

Insufficient Evidence

Guerrier contends that the evidence presented at trial was insufficient to support his burglary conviction because the State failed to establish that he entered Home Depot with the intent to commit larceny. Our review of the record on appeal reveals sufficient evidence to establish

guilt beyond a reasonable doubt as determined by a rational trier of fact. Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). The jury heard testimony from a Home Depot loss prevention officer, who testified that he saw Guerrier (1) walk into Home Depot pushing a shopping cart with a white bag in it; (2) remove a black laptop bag from the white bag, (3) place a Dewalt Impact Wrench into the laptop bag, and (4) exit Home Depot with the laptop bag around his shoulder without paying for the Dewalt Impact Wrench. In addition to the Dewalt Impact Wrench, the loss prevention officer also found another unpaid item in Guerrier's laptop bag—a utility knife. In addition to this testimony, videotape evidence of the incident was introduced at trial. As such, the jury could reasonably infer from the evidence presented at trial, along with the testimony from witnesses to Guerrier's prior bad acts of theft, that Guerrier walked into Home Depot with the intent to commit larceny. See NRS 205.060(1) (one commits burglary if, in relevant part, he enters a store with the intent to commit larceny); see also Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (noting that circumstantial evidence is enough to support a conviction). It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).

Brady violation

Guerrier maintains that the State violated Brady v. Maryland, 373 U.S. 83 (1963), by not providing the defense with a statement Guerrier allegedly made to an officer following his arrest—"I'm so sorry, I

didn't mean to do it, can you please just let me go." Guerrier asserts that this statement was not in any police report and that he was not made aware of this statement until the officer testified at trial. Guerrier maintains that the officer's failure to include this statement in the police report was potentially exculpatory because it evidenced an inadequate police investigation. We disagree and conclude that the police report's omission of Guerrier's statement was not favorable to Guerrier to effectively implicate a Brady violation. See Mazzan v. Warden, 116 Nev. 48, 66-67, 993 P.2d 25, 36-37 (2000) (holding that Brady and its progeny require a prosecutor to disclose favorable exculpatory and impeachment evidence that is material to the defense).

Ineffective Assistance of Counsel

Guerrier contends that he was denied his Sixth Amendment right to effective assistance of counsel. U.S. Const. amend. VI. As a general rule, we will not consider claims of ineffective assistance of counsel on direct appeal; instead, these claims must be presented to the district court in the first instance in a post-conviction proceeding where factual uncertainties can be resolved in an evidentiary hearing. See Johnson v. State, 117 Nev. 153, 160-61, 17 P.3d 1008, 1013 (2001). We conclude that Clark has failed to provide this court with any reason to depart from this policy in his case. See id.

Prosecutorial Misconduct

Guerrier maintains that the prosecutor committed misconduct during rebuttal closing argument by impermissibly shifting the burden of proof to Guerrier by allegedly insinuating that he had a duty to produce evidence to overcome the State's burden of proof. A prosecutor improperly shifts the burden of proof to the defendant where the prosecutor comments

on the defense's failure to call witnesses or produce evidence. See Whitney v. State, 112 Nev. 499, 915 P.2d 881 (1996). We conclude that the prosecutor's statement in this case did not constitute impermissible burden-shifting. Additionally, even if the prosecutor's statement was inappropriate, the error was harmless because of the overwhelming evidence of Guerrier's guilt. See Lisle v. State, 113 Nev. 540, 553-54, 937 P.2d 473, 481-82 (1997) (concluding that prosecutorial misconduct, including improper statements shifting the burden of proof to the defendant, was harmless).

Having considered Guerrier's contentions and concluded that no relief is warranted, we

ORDER the judgment conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. James M. Bixler, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk